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In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

**No. 494**

TERESSA COLE, Individually and as Administratrix of the Estate of Rogers L. Cole, Deceased,
*Petitioner,*

VERSUS

SUNRAY DX OIL COMPANY, AMBASSADOR OIL CORPORATION, GOFF-LEEPER DRILLING COMPANY, BARTESSA OIL CORPORATION, GOFF OIL COMPANY, ALLAN T. LEEPER, P. R. WILLIAMS, ISABELL R. SANDITEN, IRA E. SANDITEN, E. J. HIGHFILL, Trustee for Deborah Ann Sanditen; J. W. EDWARDS, JR., JOE EDWARDS and E. S. NEWTON,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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August, 1969

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1969

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## No. _____

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*Petitioner,*

VERSUS

SUNRAY DX OIL COMPANY, AMBASSADOR OIL CORPORATION, GOFF-LEEPER DRILLING COMPANY, BARTESSA OIL CORPORATION, GOFF OIL COMPANY, ALLAN T. LEEPER, P. R. WILLIAMS, ISABELL R. SANDITEN, IRA E. SANDITEN, E. J. HIGHFILL, Trustee for Deborah Ann Sanditen; J. W. EDWARDS, JR., JOE EDWARDS and E. S. NEWTON,
*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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Petitioner, Teressa Cole, individually and as administratrix of the Estate of Rogers L. Cole, deceased, prays that a *writ of certiorari* issue to review the judgment of the Supreme Court of the State of Oklahoma entered in the above entitled cause on December 5, 1967.

## OPINION BELOW

The opinion rendered by the Supreme Court of the State of Oklahoma is reported in 38 Okla. Bar Journal 2538, and with the correction of June 3, 1969, is reported in ____ P.2d ____.

## JURISDICTION

The judgment of the Supreme Court of Oklahoma was pronounced on December 5, 1967, and a petition for rehearing was denied on June 3, 1969. The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1257(3).

Article 7, Section 2, of the Constitution of the State of Oklahoma, provides: "The appellate jurisdiction of the Supreme Court shall be coextensive with the state, . . ."

From the final judgment of the Supreme Court after the taking of an appeal petitioners have no further appellate remedy under the laws of the State of Oklahoma. Rule 29 of the Revised Rules of the Supreme Court of the State of Oklahoma, effective October 2, 1967, provides that entry of final judgment occurs upon the denial of the petition for rehearing. The petition for rehearing was denied on June 3, 1969.

## QUESTIONS PRESENTED

I

Can a party to a contract, when no public policy is involved, invite the jurisdiction of a regulatory board to alter its obligation thereunder to its own advantage, thereby impairing the other party's rights under the contract through the guise of state action?

II

If such a party can, by the extension of state intervention without regard to either public policy or proper use of public power, alter the contract to its own advantage, can it be done without notice in an *ex parte* hearing?

## CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 10, of the United States Constitution, prohibiting a state from impairing the obligation of contracts;

The due process clause of the Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

The action was filed on September 23, 1963 (R. 2), by Rogers L. Cole and wife as plaintiffs, to quiet title against an expired oil and gas lease (R. 2). It was alleged the lease was made on June 13, 1962, and expired by its own terms on June 13, 1963, when the lessees, who were defendants in the quiet title action, failed to exercise the option available to extend the lease by drilling on the leased premises or paying delay rentals.

By amended answers (R. 52 and R. 86), the defendants by a plea of confession and avoidance admitted the failure to drill, or to pay rentals, and asserted that performance of either of these options necessary to extend the lease had been excused by reason of a spacing order the defendants had obtained from the Oklahoma Corporation Commission.

By reply (R. 44-73), the plaintiffs asserted the alleged spacing order was ineffective for the purpose pleaded by reason of having been obtained without notice to the lessors and for the further reason that as pleaded by the defendants would constitute an alteration of the contract.

The trial court, after trial without a jury, found the spacing order did not interfere with performance of the contract and did not excuse performance of the options available to lessees if it was desired to extend the term of the lease. Based on these findings, judgment was entered, determining that the lease had expired and quieting title against it (R. 255).

On appeal the Supreme Court of Oklahoma reversed the judgment, found that the spacing order became a part of the contract, and modified the contract to relieve lessees of the burden of exercising either of the options available to extend the lease. The opinion was announced on December 5, 1967, and rehearing was denied on June 3, 1969. No further remedy is available for review in the state courts of Oklahoma.

Pending rehearing in the Oklahoma court the lessor, Rogers L. Cole, died and the action has been revived in the name of his administratrix.

## THE FACTS MATERIAL TO THE QUESTIONS PRESENTED

### (A) Surrounding the Execution of the Contract

The plaintiff in the trial court, Rogers L. Cole, was a citizen by blood of the Choctaw Tribe of Indians (R. 92). As such Indian there was allotted to him 190 acres of land described as the West Half of the Southwest Quarter; the West Half of the East Half of the Southwest Quarter; the Northeast Quarter of the Northeast Quarter of the Southwest Quarter; the Southwest Quarter of the Northwest Quarter; and the West Half of the Southeast Quarter

of the Northwest Quarter of Section 1, Township 7 North, Range 4 West, McClain County, Oklahoma.

In May, 1962, Sunray DX Oil Company through its lawyer (R. 110), approached Rogers L. Cole with an offer to lease these lands for oil and gas drilling (R. 94). Teressa Cole was then the wife and is now the widow of Rogers L. Cole. They lived in Oklahoma City, Oklahoma, and the residence address and telephone number were readily available to the attorney for Sunray DX Oil Company who contacted them at their residence (R. 110). Terms of the proposed lease were agreed upon, which were among other things that lessee should not space the lands into units larger than 40 acres for the purpose of drilling (R. 97). Pursuant to these negotiations, on June 13, 1962, a prepared lease contract was submitted by Sunray DX Oil Company to Rogers L. Cole and wife. This tendered lease form contained a provision authorizing the lessee to space the tract into drilling units larger than the 40 acres agreed upon (R. 97), and the instrument was altered by the parties by striking out the objectionable language (R. 95).

The tendered lease form further contained a provision excusing performance by lessee if its obligations were interfered with or prevented by state or federal regulatory orders. This clause was also striken from the contract form by agreement of the parties (R. 95). With these changes in the tendered form, the lease was signed by the parties and delivered on June 13, 1962 (R. 178).

The contract was an "unless" form lease. That terminology is used among oil people to describe it, because it

provides that it expires one year from its date unless the lessee drills on the leased land or pays delay rentals (R. 178).

Sixty acres of these leased lands are in the Northwest Quarter of Section 1, and the remaining 130 acres are in the Southwest Quarter of the same section.

**(B) The Facts Surrounding the Spacing Order**

The respondent, Ambassador Oil Corporation, procured oil and gas leases from other parties covering the East Half of the Northeast Quarter of the same section in which the Cole lands were situate (R. 179-190). It thereafter entered into an agreement with Goff-Leeper Drilling Company (R. 219) whereby the latter was to acquire certain interests in such leases in exchange for development work thereon. The other respondents are investors with Goff-Leeper Drilling Company in the subsequent operations.

Pursuant to these arrangements, in August, 1962, the respondent, Goff-Leeper, entered upon the Northeast Quarter of the Northeast Quarter of Section 1 to make a re-entry into an old dry hole thereon. This well had been drilled by Carter Oil Company as dry and abandoned some 16 years earlier (R. 210).

On October 10, 1962, respondent, Goff-Leeper, reported to the Oklahoma Corporation Commission that it had re-entered this old dry hole and completed the same as a producer in both the Hunton and Osborne formations (R. 138).

Thereafter, on October 24, 1962, Goff-Leeper filed an application with the Oklahoma Corporation Commission to space the Hunton formation in Section 1 on a 160-acre basis (R. 194). This application was successfully resisted by Cole and others (R. 195).

Subsequently, on January 30, 1963, Goff-Leeper filed an application with the Oklahoma Corporation Commission to space the Osborne formation in Section 1 on a 160-acre basis (R. 124). The plaintiffs, Cole and wife, the lessors to Sunray, had no knowledge of this application until after the 14th day of June, 1963 (R. 222).

There were numerous continuances of the Goff-Leeper application to space the Osborne formation. While thus pending, and on March 15, 1963, Sunray DX Oil Company assigned to Ambassador Oil Corporation the rights in the Osborne formation under the 60 acres of the Cole lands situate in the Northwest Quarter of Section 1 (R. 136). This assignment reserved to Sunray an overriding royalty interest of 3/32nds of 7/8ths.

Goff-Leeper Drilling Company under its agreement with Ambassador Oil Corporation (R. 219) became an owner of a part of the Cole lease which Sunray had assigned to Ambassador. The other defendants in this action acquired small interests under Goff-Leeper Drilling Company.

The result of these assignments was that after March 15, 1963, the lease rights in the Osborne formation underlying the 60 acres of the Cole lands situate in the Northwest Quarter of Section 1 was owned jointly by all the respondents herein. The lease to all other formations under-

lying this 60 acres of the Cole lease was owned by Sunray DX Oil Company, and it also owned all of the rights under the lease covering the 130 acres of land situate in the Southwest Quarter of Section 1.

With the lease on the Cole lands so owned, the application of Goff-Leeper for 160-acre spacing in the Osborne formation came on for hearing before the Oklahoma Corporation Commission on March 27, 1963 (R. 197). The only appearances were by Goff-Leeper Drilling Company and Sunray DX Oil Company (R. 197). The conservation officer of the Oklahoma Corporation Commission did not appear (R. 198). The plaintiffs and lessors, Rogers L. Cole and wife, had neither knowledge nor notice of the application nor of the hearing and therefore failed to appear (R. 222). On such appearance Goff-Leeper Drilling Company and Sunray DX Oil Company by their respective attorneys presented the only testimony offered (R. 198). Admittedly, this testimony offered by Sunray DX Oil Company did not disclose pertinent geological information known to that company and its geological witness (R. 225-226). Based on that testimony alone and on the oral recommendation of Goff-Leeper Drilling Company and Sunray DX Oil Company a spacing order was entered by the Oklahoma Corporation Commission, spacing Section 1 into two 320-acre tracts or spacing units for the Osborne formation. The North Half of the section constituted one unit and the South Half the other (R. 198). This resulted in the North 60 acres of the Cole lands being spaced in the same spacing unit with the old dry hole Goff-Leeper Drilling Company was attempting to produce in the Northeast Quarter of the Northeast Quarter.

**(C) The Notice on Which Spacing Order was Obtained**

The notice given of the spacing order application was not addressed to any person in particular (R. 126). It was in the most general terms. It contained no mention of any proposed alteration of the obligations of contract. This notice was then published one time in a weekly newspaper in Purcell, Oklahoma, where neither Rogers L. Cole nor his wife resided (R. 128). It was further published one time in the Daily Law Journal-Record in Oklahoma County, a legal publication circulating primarily among lawyers (R. 130). Neither of these publications came to the attention of Rogers L. Cole or wife and they had no knowledge of either the spacing order or the application until after June 13, 1963. At the time the spacing application was filed, during all the time it was pending, and thereafter, the respondents all knew the exact residence and post office address of Rogers L. Cole and Teressa Cole. The attorney for Sunray DX Oil Company who procured the lease not only had the exact residence address but the telephone number (R. 111-112). He also knew this was the mailing address (R. 113). This exact mailing address was shown on the face of the lease contract, and as such was filed in the office of the register of deeds (R. 178). With this knowledge on the part of all the respondents it was conceded no effort was made to notify either Rogers L. Cole or wife of the spacing application other than the newspaper insertions.

**(D) Subsequent Events**

During the pendency of the appeal the Oklahoma Corporation Commission in a contested proceeding found that the spacing order relied on by lessees could not be sustained in the interest of conservation. The spacing pattern was accordingly changed. This action occurred after the appeal was lodged in the Oklahoma Supreme Court and consequently it does not appear in the record of the trial court. However, copies of such orders from the Oklahoma Corporation Commission are attached as appendix to the brief filed by respondents in the Oklahoma Supreme Court in May, 1968. Such orders are therefore a part of the record here.

During the pendency of the action in the Oklahoma Supreme Court the lessor, Rogers L. Cole, died, and the action was there revived in the name of his administratrix, who under Oklahoma statutes is authorized to prosecute or defend such an action.

## FEDERAL QUESTIONS RAISED IN TRIAL COURT AND SUPREME COURT OF OKLAHOMA

When the regulatory order was pleaded as a defense in the trial court, the lack of notice with resulting lack of due process to support the order and the alteration of contract were promptly raised by reply (R. 29). The same issues were again raised in the reply to the amended answers (R. 73). The questions were presented in the briefs in the trial court as shown by the one brief which has found its way into the record (R. 234).

The questions were presented in the briefs in the Oklahoma Supreme Court, and by further briefs requested

by that court on the issue of due process, as well as the petition for rehearing and supporting briefs all reflected by the record filed herewith.

## ARGUMENT

In both the trial court and the Oklahoma Supreme Court respondents attempted to distort petitioner's position into an attack on the spacing or conservation laws of the State of Oklahoma. To properly understand petitioner's position, let us make it clear that at no time is pooling, spacing, or any conservation policy involved in this case. If petitioner or anyone else is aggrieved by spacing orders, in the producing of oil or gas, an adequate remedy is available before the Oklahoma Corporation Commission with the right of appeal therefrom. Petitioner has availed herself of that remedy and the spacing order has been changed, as shown by the copies of the order of the Corporation Commission attached to the brief filed by respondents in May, 1968, before the Oklahoma Supreme Court. Neither the spacing legislation nor the application of it by the Oklahoma Corporation Commission attempts to define or adjudicate rights under oil and gas leases. Therefore, although spacing, pooling, conservation laws, and the police power as such are not here involved, we have a judicial decision which holds that a spacing order, later found to be improper for spacing purposes by the regulatory agency, is construed to have the side effect of altering contract obligations all obtained without notice in an *ex parte* hearing.

These constitutional questions are of far-reaching effect, and we present them under the following propositions:

## I

**CAN A PARTY TO A CONTRACT, WHEN NO PUBLIC POLICY IS INVOLVED, INVITE THE JURISDICTION OF A REGULATORY BOARD TO ALTER ITS OBLIGATION THEREUNDER TO ITS ADVANTAGE, THEREBY IMPAIRING THE OTHER PARTY'S RIGHTS UNDER THE CONTRACT THROUGH THE GUISE OF STATE ACTION?**

The contract form which was tendered to Rogers L. Cole authorized the lessee to voluntarily space the lands into tracts containing as much as 640 acres. By agreement the form was altered to limit this voluntary spacing to not exceed 40 acres (R. 97). The tendered contract further contained a provision incorporating any regulatory orders which might thereafter be issued into the lease contract and excusing performance by the lessee thereunder. This provision was also stricken by the parties (R. 95). The trial court held the striking of these provisions was a substantial part of the consideration for the lease (R. 243). Further, the trial court found the lease was a private contract and although the property was subject to the exercise of the police power the court found "the parties are not subject to having another and different contract substituted for that which they bargained" (R. 245).

To escape these contract limitations, the respondent, Goff-Leeper Drilling Company, first filed an application with the Oklahoma Corporation Commission as a regulatory agency to space the Hunton formation in this section on a 160-acre basis. Knowledge of this application came to the attention of Cole and others and was defeated (R. 195). After the failure of this first application a second

was filed, and this time to space the Osborne formation on a 160-acre basis (R. 124). Knowledge or notice of this application did not come to the attention of Cole (R. 222). When for lack of knowledge Cole and wife failed to appear and contest, an arrangement was worked out between respondents for the adjustment of their rights. Under this arrangement Sunray DX Oil Company assigned to Ambassador Oil Corporation the Osborne rights under the North 60 acres of the Cole lease, reserving an overriding interest in the production (R. 136). Goff-Leeper Drilling Company under its contract with Ambassador thus became interested in the North 60 acres of the Cole lease, and the other respondents under their arrangements with Goff-Leeper Drilling Company likewise became so interested. With the rights of all respondents then being defined by these arrangements, Goff-Leeper Drilling Company and Sunray DX Oil Company called up the 160-acre spacing application for hearing, and on such hearing they joined in an oral application for 320-acre spacing (R. 197). When such oral application was granted it included the 60 acres of the Cole lands situate in the Northwest Quarter of the section in a 320-acre spacing unit which included the old abandoned dry well respondents had re-entered in the Northeast Quarter of the Northeast Quarter of such section, and which respondents were then proposing to produce.

This regulatory order thus obtained was then pleaded by respondents as a change in the contract (R. 52-86). It was contended the resulting contract alterations had relieved lessees of the contract obligation to drill or pay rentals as a condition to the extension of the contract. The

Oklahoma Supreme Court has adopted that view and has held that such a regulatory order became a part of the contract and modified its terms. Indisputably this regulatory order did not prevent the paying of delay rentals. Neither did the regulatory order prevent the drilling to any formation on the South 130 acres of the tract. It did not prevent drilling on any part of the 60 acres situate in the North Half of the section to other than the Osborne formation. Since performance under the contract was not prevented, obviously there was no conflict between the contract and the exercise of the police power.

By Article 1, Section 10, of the United States Constitution, "no state shall * * * pass any * * * law impairing the obligations of contracts, * * *." This provision is as binding on the courts and judges as it is on the legislature. "This Constitution, * * *, shall be the supreme law of the land; and the judges in every state shall be bound thereby. Anything in the Constitution or laws of any state to the contrary notwithstanding." United States Constitution, Article 6.

The construction adopted by the Oklahoma Supreme Court is therefore an impairment of the obligation of contracts contrary to the provisions of the Federal Constitution.

## II

**IF SUCH A PARTY CAN BY THE EXTENSION OF STATE INTERVENTION WITHOUT REGARD TO EITHER PUBLIC POLICY OR PROPER USE OF PUBLIC POWER ALTER THE CONTRACT TO ITS OWN ADVANTAGE, CAN IT BE DONE WITHOUT NOTICE IN AN EX PARTE HEARING?**

If the contract is subject to alteration by the spacing order, then notice and opportunity to be heard is required under the due process clause of the Fourteenth Amendment. The Oklahoma court has refused to follow the decision of this Court in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, defining requirements of due process.

The contract between the parties gave the respondents two options if they decided to continue the lease beyond one year. These options were either to drill on the property or to pay delay rentals. The trial court found (R. 242), and it is indisputable, that no well was commenced and no delay rental paid.

As a defense to the termination of the lease from this failure to drill or pay, respondents rely on a change in the contract terms by reason of the spacing order obtained from the Oklahoma Corporation Commission (R. 198). The applicants for this spacing order and the only persons appearing at the *ex parte* hearing at which it was granted were the respondents. These respondents were the beneficiaries of the asserted order, and, of course, were the adversaries of petitioners in any application which would change the terms of the contract.

These adversaries and applicants at all times had the exact mailing address of petitioners in their files, and in fact the exact mailing and residence address of petitioners was reflected by the lease itself which was also a public record (R. 178).

With this knowledge of the exact whereabouts and mailing address of petitioners, who were their lessors, respondents gave only publication notice of the hearing, and this in local newspapers (R. 128-130). While the application for the order was pending and after it became apparent by their silence that petitioners had no notice or knowledge of the application, the respondents adjusted their respective interests between themselves (R. 136), and then orally amended their application and obtained the order relied upon (R. 197).

There can be no doubt that the lease, the right to terminate it, and the right to have a well drilled on the leased premises or to receive delay rentals, are all valuable property rights of which petitioners are being deprived if the contract is altered by the spacing order. The circumstances of the publication notice, the knowledge by respondents of the exact mailing address of petitioners, and the adversary position of the parties fit the factual situation in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, like a glove. There the Court said:

> "It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this court on the question

of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation, the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract and does not inform acquaintances who might call it to his attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

This same rule was followed by this Court in *City of New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 299, 73 S.Ct. 299, where this Court held:

"Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication. See E. G., Standard Oil Company v. State of New Jersey, 341 U.S. 428, 71 S.Ct. 842, 95 L.Ed. 1078. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from 'constructive

notice' by newspaper"—City of New York v. New York N.H. & H.R. Company, 344 U.S. 299, 73 S.Ct. 299.

"The statutory command for notice embodies a basic principle of justice—but a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."

The facts here presented by petitioners are even stronger than either of these cases cited. Here the adversary and asserted beneficiary of the order was actually the applicant for the order relied on, plus the further fact that when the *ex parte* order came up for consideration before the regulatory agency in a contested proceedings it was abrogated for all other purposes.

The result is the depriving of petitioners of property rights without due process under the most aggravated circumstances. It is the establishment of a state rule by the Oklahoma Court in conflict with the interpretation of the Fourteenth Amendment of the Federal Constitution adopted by this Court.

For these reasons petitioners respectfully request that a *writ of certiorari* issue to the Supreme Court of the State of Oklahoma.

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August, 1969

# APPENDIX

FILED IN
DISTRICT COURT
McCLAIN COUNTY, OKLA.
JAN. 28 1965

IN THE DISTRICT COURT OF McCLAIN COUNTY
STATE OF OKLAHOMA

| | | |
|---|---|---|
| Rogers L. Coale, et ux., Plaintiffs, | ) | |
| | ) | |
| —vs— | ) | NO. 9825 |
| | ) | |
| Sunray DX Oil Co., et al., Defendants. | ) | |

## FINDINGS OF FACT & CONCLUSIONS OF LAW
## FINDINGS OF FACT

1. The plaintiffs are the owners of all the oil, gas and minerals in, to and under the West Half of the Southwest Quarter and the West Half of the East Half of the Southwest Quarter and the Northeast Quarter of the Northeast Quarter of the Southwest Quarter and the Southwest Quarter of the Northwest Quarter, and the West Half of the Southeast Quarter of the Northwest Quarter, all in Section 1, Township 7 North, Range 4 West, McClain County, Oklahoma.

2. On June 13th, 1962, plaintiff lease their above described minerals to the Sunray DX Oil Company for a primary term of 5 years, and so long thereafter as oil and gas or other minerals were produced. The lease was duly recorded.

3. Under the terms of the lease, the lessee was required to pay an annual rental of $190.00 on or before the 13th day of June, 1963, unless a well was commenced by said date. Such delay rental was not paid or tendered, and no well was commenced on the property by that date.

[APPENDIX]

4. Plaintiff's action herein was brought on September 23rd, 1963, for cancellation of the lease, after having their request for release denied.

5. On or about August 13, 1962, re-working operations were commenced on the Edwards #1 Well, formerly abandoned around 1950 as a dry hole, and in which some of defendants had an interest; said well is located in the northeast Quarter of the Northeast Quarter of Section 1. The well was completed in October, 1962, as a commercial producer.

6. Sunray DX Oil Company on March 15th, 1963, assigned all its interest in the Osborne Formation in that part of plaintiff's lease located in the North Half of Section 1, reserving an overriding royalty interest of 3/32 of 7/8 of the production therefrom, to the Ambassador Oil Corporation.

7. On March 27th, 1963, upon application of defendants and by Order of the Corporation Commission of Oklahoma 320 drilling and spacing units were established for the Osborne Formation in Section 1, dividing it into a North Half and a South Half. The Order further provided for the unitization and communitization of the drilling and spacing units for the Osborne sand or Formation.

8. Ambassador Oil Corporation assigned its interest in the lease of plaintiffs in the North Half of Section 1 to Goff-Leeper Drilling Company, reserving an override, all of which was duly recorded.

9. Goff-Leeper Drilling Company assigned all its right, title and interest in plaintiff's leasehold in the North Half of Section 1 to the other defendants in the case.

10. All defendants, except Sunday DX Oil Company, disclaim any interest to any of plaintiff's minerals in the South Half of Section 1, and to all except those in the Osborne Formation in the North Half of Section 1.

11. The oil and gas lease as sold by the plaintiffs and purchased by Sunray DX Oil Company provided for spacing not to exceed 40 acres per well, struck the usual provision that the lease was subject to State and Federal rules and regulations, and such limitations were a substantial part of the consideration for the sale of the lease.

12. The effect of the Order of the Corporation Commission of Oklahoma, procured at the instance of defendants, was to change said lease from spacing not to exceed 40 acres to spacing of 320 acres.

13. There has been no development of the lease in the South Half of Section 1 effecting any of the questions involved in this action.

## CONCLUSIONS OF LAW

1. The Plaintiffs by valid contract, sold a lease on their oil, gas and other minerals to the Sunray DX Oil Company, who properly assigned portions of that interest to other defendants herein.

2. The contract of the parties validly provided for the development of the lease by spacing of not more than 40 acres per well, and specifically excluded State or Federal rules and regulations from implied inclusion in their agreement.

3. The Order of the Corporation Commission of Oklahoma is not subject to collateral attack in this action for cancellation of the lease.

4. This trial court will conclusively presume that the Corporation Commission of Oklahoma had jurisdiction and that it entered a valid Order spacing and unitizing the leasehold interests described in its Order.

5. The valid Order of the Corporation Commission of Oklahoma, providing for 320 acre spacing of the Osborne Formation in the area, as procured by the defendants, did

not excuse them from otherwise developing the lease in compliance with their contract.

6. The lessee and assigns cannot by their own actions render themselves incapable of performance of their agreement, then plead it in defense of their breach of that agreement.

7. The lessee had a right, upon election to pay delay rentals, to continue the lease on the minerals of plaintiffs.

8. If the lessee did not elect to preserve its lease upon the minerals of plaintiffs after procuring the Order of the Corporation Commission of Oklahoma, by paying the agreed daily rentals, it still has a right to contribution from plaintiffs for expenses before plaintiffs are entitled to share in the proceeds of production under the valid unitized and communitized spacing Order.

9. Every Oklahoma oil and gas lease is subject to the police power of the State of Oklahoma through its Corporation Commission.

10. Every oil and gas lease is a private contract between the parties thereto, and their assigns. While such is subject to the police power of the State, the parties are not subject to having another and different contract substituted for that which they bargained.

11. The lease in this case, having not been extended by the commencement of a well thereon within the primary period, and not having been extended by the payment of delay rentals, is not extended as a "producing lease" by reason of State rules or regulations having been specifically excluded by the parties from their contract.

12. The valid action of the Corporation Commission of Oklahoma having not excused performance of the terms of the lease, and lessees having not commenced a well on the lease or extended the time by payment of delay rentals, the lease is adjudged terminated as having expired by its own terms, is ordered cancelled and plaintiff's title quieted,

exceptions allowed defendants, all as per J. E. which counsel will prepare in accordance with these findings.

Dated at Purcell, Oklahoma, this 28th day of January, 1965.

/s/ Elvin J. Brown
Elvin J. Brown, Judge.

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FILED IN
DISTRICT COURT
McCLAIN COUNTY, OKLA.
MAR 3 1965

IN THE DISTRICT COURT OF McCLAIN COUNTY
STATE OF OKLAHOMA

| | | |
|---|---|---|
| ROGERS L. COLE AND TERESSA COLE, husband and wife, | ) | |
| Plaintiffs, | ) | |
| —VS— | ) | NO. 9825 |
| SUNRAY DX OIL COMPANY, ET AL., | ) | |
| Defendants. | ) | |

JOURNAL ENTRY OF JUDGMENT

BE IT REMEMBERED, that on the 4th day of June, 1964, this matter came on for hearing, the plaintiffs appearing by their attorney, George Bingaman, and the defendant, Sunray DX Oil Company, appearing by Montgomery and Montgomery and John F. Curran, its attorneys, and Ambassador Oil Corporation appearing by C. Harold Thweatt, its attorney, and Goff-Leeper Drilling Company and other individual defendants appearing by their attorney, Barth P. Walker. Thereupon the parties announced ready for trial; and thereupon the plaintiffs proceeded to

introduce their evidence and rested. The plaintiffs having rested, the defendants presented their demurrer to the evidence and which demurrer was overruled and exception allowed. Thereupon the defendants introduced their evidence and rested; and thereupon plaintiffs introduced their rebuttal evidence and rested. Thereupon the defendants renewed their demurrer to the evidence of the plaintiffs and which demurrer was overruled and exception allowed.

Thereupon the defendants requested that the court make findings of fact and conclusions of law. Thereupon the court took the case under advisement, and the plaintiffs and defendants submitted to the court proposed finding of fact and conclusions of law. Thereafter and on January 28, 1965, the court rendered findings of fact and conclusions of law in favor of the plaintiffs and against the defendants.

The findings of fact and conclusions of law filed herein on January 28, 1965, are incorporated herein and made a part of this judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the oil and gas lease, dated June 13, 1962, recorded in Book 342 at Page 661 of the records in the office of the County Clerk of McClain County, Oklahoma, and covering real property belonging to the plaintiffs, being described as the West half of the Southwest Quarter and the West Half of the East Half of the Southwest Quarter and the Northeast Quarter of the Northeast Quarter of the Southwest Quarter and the Southwest Quarter of the Northwest Quarter and the West Half of the Southeast Quarter of the Northwest Quarter of Section 1, Township 7, North, Range 4 West, McClain County, Oklahoma, has terminated and expired by its own terms, and that such termination occurred on the 13th day of June, 1963, by reason of the failure of the lessee to pay the annual delay rental in the amount of $190.00 in lieu of commencing the drilling of a well for oil or gas on

said premises, and that no well had been commenced on said premises and said lease is adjudged to have terminated on the 13th day of June, 1963:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the title of the plaintiffs in and to said premises is quieted, confirmed and established in them free and clear of such lease, and said lease is canceled of record.

To all of which findings of fact, conclusions of law and judgment the defendants and each of them object and except and exceptions are by the court allowed.

/s/ Elvin J. Brown
DISTRICT JUDGE

O. K.

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By /s/ MAX H. LAWRENCE
Attorneys for other defendants.

[APPENDIX]

SUNRAY D-X OIL CO. et al. v. COLE et ux.
No. 41559. Dec. 5, 1967.

(Syllabus.)

1. Under a clause in an oil and gas lease wherein the lessee obligates himself to either commence the drilling of an oil or gas well or pay delay rentals in lieu thereof, the drilling and completion of a successful commercial gas well on lands other than the leased premises, but within the same well spacing unit, is a compliance with such provision and serves to relieve the lessee from paying any further delay rentals.

2. If the governmental "regulatory" provision in an oil and gas lease is deleted and the parties do not provide for their rights and obligations in the event the Corporation Commission does exercise its "regulatory" authority over the leased premises, the rights and obligations of the parties are the same as they would have been had the governmental "regulatory" provision not been deleted.

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Appeal from District Court, McClain County; Elvin J. Brown, Judge.

Defendants in error commenced proceedings to terminate an oil and gas lease for failure to pay delay rentals. The trial court terminated the oil and gas lease and plaintiffs in error appeal from the order overruling their motion for a new trial. Judgment reversed with directions.

Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson, C. Harold Thweatt, Oklahoma City, Montgomery & Montgomery, Purcell, M. Darwin Kirk, J. P. Greve, and John F. Curran, Tulsa, Walker, Lawrence & Harris, Max H. Lawrence, Oklahoma City, for plaintiffs in error.

Bingaman & Smith, George Bingaman, Purcell, for defendants in error.

IRWIN, V.C.J. The parties will be referred to as they appeared in the trial court.

Plaintiffs commenced the action for the termination of an oil and gas lease for failure to pay delay rentals. Defendants' defense was that it was not required to pay delay rentals to keep the lease in force and effect for the reason that a producing well had been drilled within a spacing unit established by the Corporation Commission and a portion of the leased premises was within such spacing unit. The trial court terminated the lease and defendants appealed from the order overruling their motion for a new trial.

## FACTS

Plaintiffs were the owners of a mineral interest in part of the NW-¼ and SW-¼ of a section of land. On June 13, 1962, plaintiffs executed an oil and gas lease to one of the defendants and by subsequent assignments the other defendants acquired various interests therein. The lease was for a primary term of five years with the usual "thereafter" clause and provided for payment of delay rentals in lieu of development. Two provisions were deleted in the lease by drawing lines through the provisions in the printed lease. The first deletion was in the pooling clause where the language permitting voluntary pooling into units exceeding 40 acres was stricken. The second deletion was the entire paragraph containing this language: "All express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules and Regulations, and this lease shall not be terminated, in whole or in part, nor lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or such failure is the result of any such law, Order, Rule or Regulation."

In October, 1962, a well in the NE-¼ of the section had been completed and was producing gas and gas condensate from the Osborne formation. In March, 1963, and prior to the time any delay rentals were due plaintiffs, the Corporation Commission entered an order establishing 320 acre

drilling and spacing units for the production of gas and gas condensate from the Osborne formation underlying the section. A portion of the leased premises is located within the 320 acre spacing unit where the productive well is located but the well is not located on the leased premises. On the anniversary date of the lease, i.e., June 13, 1963, no delay rentals had been paid nor had a well been commenced upon the lands covered by the lease.

The trial court found in its conclusions of law that:
"* * *

"11. The lease in this case, having not been extended by the commencement of a well thereon within the primary period, and not having been extended by the payment of delay rentals, is not extended as a 'producing lease' by reason of State rules and regulations having been specifically excluded by the parties from their contract.

"12. The valid action of the Corporation Commission of Oklahoma having not excused performance of the terms of the lease, and lessees having not commenced a well on the lease or extended the time by payment of delay rentals, the lease is adjudged terminated as having expired by its own terms, is ordered cancelled and plaintiff's title quieted, * * *"

## ISSUE

If the two deletions in the oil and gas lease had not been made, under the authority of Trawick v. Castleberry, Okl., 275 P.2d 292; Layton v. Pan American Petroleum Corporation, Okl., 383 P.2d 624; and Oklahoma Natural Gas Company v. Long, Okl., 406 P.2d 499, the productive well on the 320 acre spacing and drilling unit established by the Corporation Commission relieved the defendants from paying delay rentals to keep the lease in force and effect since part of the leased premises is within the 320 acre spacing unit. Therefore, the fundamental issue presented is the force and effect of the two deletions in the oil and gas lease.

If by such deletions, the drilling of the productive well on the 320 acre spacing unit established by the Corporation Commission which included a portion of the leased premises, did not relieve the defendants from paying delay rentals to keep the lease in force and effect, the judgment of the trial court should be affirmed.

On the other hand, if the drilling of the productive well on the 320 acre spacing unit did relieve the defendants from paying the delay rentals to keep the lease in force and effect, notwithstanding the two deletions in the oil and gas lease, the judgment of the trial court should be reversed.

## CONCLUSIONS

Plaintiffs did not seek a rescission of the oil and gas lease and their cause of action is based entirely on the proposition that the lease terminated for failure to pay delay rentals.

Plaintiffs concede that the parties could not by contract limit the powers of the Corporation Commission to enter spacing orders for the conservation of oil and gas. They also recognize that under the provisions of Title 52 O.S. 1961, § 87.1(d), after the Corporation Commission entered the drilling and spacing order involved in the instant case, the drilling or operating of any well in violation of such order was prohibited. Plaintiffs argue, however, that there was nothing in the order which prevented defendants from paying delay rentals or from drilling on any portion of the leased premises, except that such order did prevent defendants from drilling a well into the Osborne formation in the NW-¼.

What the defendants could have done under the terms of the lease without being in violation of the spacing order of the Corporation Commission is not the controlling issue. The controlling issue is whether the lease expired for failure to pay delay rentals. If defendants were relieved of

paying delay rentals to keep the lease in force and effect, what defendants could have done is immaterial as defendants' defense is based upon compliance with the lease contract as modified by the spacing order and not upon an excuse for non-compliance.

Plaintiffs contend that defendants are estopped to plead as a defense to an express provision of its lease contract an ex parte spacing order obtained on its application without full disclosure of the facts to the Corporation Commission and without notice to them. To sustain this contention, plaintiffs argue that the lease prohibited pooling into units greater than 40 acres and to insure strict compliance with that provision, the so-called "regulatory" clause excusing performance by defendants if prevented by a regulatory order, was stricken from the lease, and, that if the spacing order prevented defendants from complying with the terms of the lease it has been by their own procurement and under the recognized principles of estoppel they can not plead such order as a defense.

The Corporation Commission had the authority and jurisdiction to enter the spacing order involved. It is a valid and binding order and has become final. Under the provisions of Title 52 O.S. 1961, § 111, the same is not subject to collateral attack. The trial court also found that such order was not subject to collateral attack and plaintiffs did not challenge such finding by filing a cross-appeal. Whether defendants could rely on the spacing order and the production obtained thereunder as a defense in this action depends upon our determination of the fundamental issue herein presented, i.e., what is the force and effect of the two deletions in the oil and gas lease.

This issue is presented in plaintiffs' contention that the lease contract is controlling as to the rights and obligations of the parties and the spacing order was not a substitute for the lease contract; that the lease contract was clear and explicit and fixed precisely the conditions upon

which its continuance depended; and that compliance with the conditions contained in the lease was not excused by the regulatory order of the Corporation Commission.

Plaintiffs cite Hanscome v. Coppinger, (Kan.), 331 P.2d 590, as controlling when the application of governmental regulatory orders are pleaded as a defense. In our opinion, the Hanscome case is not persuasive in the instant action. In Hanscome, the Kansas regulatory body had not exercised jurisdiction over the mineral interests involved. In the case at bar, the Corporation Commission had exercised its jurisdiction and entered its spacing order.

We will first determine the effect of deleting the so-called governmental "regulatory" clause in the oil and gas lease. The Supreme Court of Louisiana in considering the deletion of a printed clause in an oil and gas lease in Hood v. Southern Production Co., 206 La. 642, 19 So. 2d 336, said:

"* * * The printed form of the lease contained a clause providing that if at any time during the period of the lease the lessee should deem it advisable or expedient to form a drilling unit or units to conform with spacing rules issued by the Conservation Commissioner or by any federal authority having control of such matters, or in order to conform with conditions imposed upon the issuance of drilling permits, the lessee should have the right to pool or combine the land covered by this lease, or any portion thereof, with any other land or lease or leases in the immediate vicinity, et cetera. Hood insisted upon deleting this printed clause in the form of lease—and it was deleted—because Hood refused to grant permission to the lessee to combine or pool the leased premises with other lands or mineral interests, but it did not, because it could not, interfere with the authority of the provision in the printed form of lease merely denied the lessee the right to consent to pooling the leased premises with other lands or minteral interests, but it did not, because it could not, interfere with the authority of the

Commissioner of Conservation or with any federal authority, to compel the combining or utilizing of the leased premises with other land or lands or mineral interests for the purpose of forming a drilling unit, for the prevention of waste and to avoid the drilling of unnecessary wells. * * *"

In the Hood case, as in the case at bar, the parties did not provide for the rights and obligations of the parties in the event a so-called governmental "regulatory" agency exercised its regulatory powers over the mineral rights involved.

In Layton v. Pan American Petroleum Corporation, Okl., 383 P.2d 624, we held the right of the Legislature to act under the police power of the state is a part of the existing law at the time of the execution of every contract, and as such becomes in contemplation of law a part of that contract. As a part of that existing law, the Corporation Commission had the power and authority under § 97.1 (d), supra, to establish the drilling and spacing units in the instant proceedings whether the minerals were leased or unleased. When plaintiffs executed the oil and gas lease in question, their right to drill upon the leased premises for the purpose of producing oil or gas passed to the lessee (defendants). Defendants' rights to drill upon the leased premises were limited by the proper exercise of the State's police power. See Indian Territory Illuminating Oil Co. v. Larkins, 168 Okl. 69, 31 P.2d 608. Although defendants could not have voluntarily pooled the leased acreage into units exceeding 40 acres, the parties by contractural agreement could not limit the Corporation Commission from establishing drilling and spacing units in excess of the 40 acres. Landowners, Oil, Gas and Royalty Owners v. Corporation Commission, Okl., 420 P.2d 542. The Corporation Commission did establish such units. The oil and gas lease contained no provision whatsoever providing for the rights and obligations of the parties in the event the Corporation Commission did exercise its regulatory authority over the leased premises.

In view of the fact that the parties could not limit the authority of the Corporation Commission to exercise its regulatory control over the leased premises and its authority to act became a part of the oil and gas lease, and the parties did not provide for the rights and obligations of the parties in the event the Corporation Commission exercised its regulatory authority, we can only conclude that deleting the so-called governmental "regulatory" provision neither enlarged nor diminished the rights and obligations of the parties. In other words, if the governmental "regulatory" provision in an oil and gas lease is deleted and the parties do not provide for their rights and obligations in the event the Corporation Commission does exercise its "regulatory" authority over the leased premises, the rights and obligations of the parties are the same as they would have been had the governmental "regulatory" provision not been deleted.

Since the deletion of the governmental "regulatory" provision did not change the rights and obligations of the parties, under the authority of Oklahoma Natural Gas Company v. Long, Okl., 406 P.2d 499, defendants were relieved from paying delay rentals to keep the lease in force and effect. Since defendants were not required to pay delay rentals to keep the lease in force, it is unnecessary to consider the effect of deleting the provision permitting voluntary pooling into units exceeding 40 acres.

Judgment reversed with directions to enter judgment for defendants.

JACKSON, C.J., and DAVISON, WILLIAMS, LAVENDER, and McINERNEY, JJ., concur. HODGES, J., concurs in results.

[APPENDIX]

FILED
SUPREME COURT
OF OKLAHOMA
JUN 3 - 1969
ANDY PAYNE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| Sunray DX Oil Company, Ambassador Oil Corporation; Goff-Leeper Drilling Company; Bartessa Oil Corporation; Goff Oil Company, Allan T. Leeper; P. R. Williams; Isabell R. Sanditen; Ira E. Sanditen; E. J. Highfill, Trustee for Deborah Ann Sanditen; J. W. Edwards, Jr.; Joe Edwards; and E. S. Newton, | ) | |
| Plaintiffs in Error, | ) | |
| vs. | ) | No. 41,559 |
| Rogers L. Cole and Teressa Cole, husband and wife, | ) | |
| Defendants in Error. | ) | |

CORRECTION ORDER

It is hereby ordered that the opinion in the above styled case promulgated December 5, 1967, be corrected in the following manner;

On page 8, at the conclusion of the opinion, by deleting the words: "Concur: Jackson, C.J., and Davison, Williams, Lavender and McInerney, JJ. Concur in Results: Hodges, J." and substituting therefore, as the vote on the opinion, the following words:

Concur: Jackson, C.J., and Davison, Berry and Lavender, JJ.

Dissent: Williams, Hodges and McInerney, JJ.

In all other respects the said opinion shall remain unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 2nd day of June, 1969.

Pat Irwin

[s/] ----------

Chief Justice